

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

OHIO CASUALTY INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:06-cv-977-MEF
)	
MANIFOLD CONSTRUCTION, LLC, et al.,)	
)	
Defendants.)	

REPLY BRIEF TO PLAINTIFF’S RESPONSE TO MOTION TO DISMISS

COME NOW the Defendants, Whittelsey Properties, Inc. (hereinafter referred to as “Whittelsey Properties”) and C.S. Whittelsey, IV (hereinafter referred to as “Sheldon”), and file this reply brief to Plaintiff’s response to motion to dismiss.

EXHIBITS

The following exhibits are referenced in further support of Defendants’ motion to dismiss. The exhibits are attached hereto and incorporated herein by reference.

- Exhibit D: A certified portion of Trial Transcript from Civil Action No. CV-05-137 in the Circuit Court of Lee County, Alabama.
- Exhibit E: Ohio Casualty’s Letter Brief dated April 20, 2006, in Civil Action No. CV-05-137 in the Circuit Court of Lee County, Alabama.
- Exhibit F: Motion for New Trial filed by Manifold Construction, LLC and Jack Manifold in Civil Action No. CV-05-137 in the Circuit Court of Lee County, Alabama.

ADDITIONAL FACTS IN RESPONSE TO PLAINTIFF'S BRIEF

On the 30th day of October, 2006, when the Defendants proceeded to trial against Manifold and Jack in the Lee County Case, McIlwain was present at each and every stage of the trial. After the jury was excused to return to the jury deliberation room, the trial court asked McIlwain if he would like to be heard on Ohio Casualty's motion. (Exhibit D, p. 59-60). McIlwain announced on the record that he wished to withdraw Ohio Casualty's motion for limited intervention. (Exhibit D, p. 60). Ohio Casualty's motion for limited intervention was not met with a stone wall in State Court, as contended by Ohio Casualty. (Plaintiff's Response Brief, p. 8). Defendant's offered no objection to Ohio Casualty's motion at trial. (Exhibit D, p. 60-61). Defendant's were not aware Ohio Casualty had filed the present action. Although Ohio Casualty's complaint is stamped filed October 31, 2006, the summons directed to Sheldon is dated November 7, 2006. See File in the present Action.

Ohio Casualty claims that its present action and its motion for limited intervention do not "mirror" each other as claimed by Defendants. (Plaintiff's Response Brief, p. 3, ¶ 8). However, Plaintiff's motion for limited intervention was filed to allow Ohio Casualty to submit post-verdict interrogatories to the jury, as the answers would be "necessary to determine [Ohio Casualty's] obligations under the Policies [of insurance issued to Manifold and Jack]" (Exhibit B, p. 2, ¶ 6), and the present action requests "the Court determine the rights and obligations of the parties under the policy of insurance as they relate to the underlying lawsuit;..." (Plaintiff's Complaint for Declaratory Judgment, p. 2, ¶ 1). In further support of is motion for limited intervention, Ohio Casualty addressed the trial judge in a letter brief dated April 20, 2006, stating: "[Y]ou will be the final arbiter on what interrogatories are propounded to the jury, and that answers to those interrogatories will effectively determine whether the Plaintiffs will

actually receive and compensation, I submit that intervention is an absolute necessity.” (Exhibit E, pp. 2-3). The two requests are obviously similar.

ARGUMENT

I. Waiver.

In response to the first issue raised in Defendants’ motion to dismiss, Ohio Casualty argues that it did not file a declaratory judgment action in State court, but that it merely sought to intervene to submit interrogatories to the jury whose answers would be used in a later proceeding. (Plaintiff’s Response Brief, p. 5). No allegation has been made that Ohio Casualty filed a declaratory judgment action in State court; however, the request for relief in its motion for limited intervention and its request for relief in the present action are very similar. (Exhibit B, p. 2, ¶ 6; Plaintiff’s Complaint for Declaratory Judgment, p. 2, ¶ 1). The issues presented by Ohio Casualty in its complaint for declaratory judgment could have been resolved at the end of the trial in the Lee County Case; however, while the jury was waiting in the jury deliberation room, Ohio Casualty chose to withdraw its motion for limited intervention. By withdrawing its motion for limited intervention, Ohio Casualty waived any right it may have had to pursue a declaratory judgment as to the same issues raised in its motion for limited intervention.

Ohio Casualty next argues that Defendant’s are judicially estopped from moving to dismiss this action. (Plaintiff’s Response Brief, p. 5). In the case cited by Ohio Casualty, New Hampshire v. Maine, 532 U.S. 742 (2001), the Court held that for judicial estoppel to apply “First, a party's later position must be “clearly inconsistent” with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create “the perception that either the first or the second court was misled,...”

A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” 532 U.S. at 750-751 (citations omitted). As set forth above, the trial court did not deny Ohio Casualty’s motion for limited intervention, it took the motion under advisement. When the trial court asked McIlwain if he would like to be heard on Ohio Casualty’s motion, he announced on the record that he wished to withdraw Ohio Casualty’s motion for limited intervention. (Exhibit D, p. 59-60). Being unaware of the present action, Defendant’s offered no objection to Ohio Casualty’s motion at trial. (Exhibit D, p. 60-61). There never was a ruling by the trial court. Ohio Casualty’s reliance on judicial estoppel in the present case is misplaced.

Ohio Casualty chose to avoid the most cost effective avenue to resolve the issues raised in its motion for limited intervention and complaint for declaratory judgment. Ohio Casualty waived any right it may have had to pursue the present litigation; therefore, Ohio Casualty’s complaint for declaratory judgment is due to be dismissed.

II. Ameritas Factors.

In response to the second issue raised in Defendants’ motion to dismiss, Ohio Casualty argues that Ameritas Variable Life Ins. Co. v. Roach, 411 F.3d 1328 (11thCir. 2005) is not applicable to the present case as “none of the circumstances present in Ameritas are present in the instant action.” (Plaintiff’s Response Brief, p. 6). Of the nine factors enumerated in Ameritas, several are present in this action:

“(1) [T]he strength of the state's interest in having the issues raised in the federal declaratory action decided in the state courts;...” Id., at 1331. Alabama does have an interest in having the issues raised in the present action determined by state courts, hence the Alabama Direct Action Statute.

“(3) [W]hether the federal declaratory action would serve a useful purpose in clarifying the legal relations at issue;...” Id. The clarifying of issues could have been taken care of in State court at the end of the trial, and they can still be clarified in State court if suit under Alabama’s Direct Action Statute is required.

“(4) [W]hether the declaratory remedy is being used merely for the purpose of ‘procedural fencing’-that is, to provide an arena for a race for *res judicata* or to achieve a federal hearing in a case otherwise not removable;...” Id. Ohio Casualty did not like the way things were going at trial so it withdrew its request to submit interrogatories to the jury, and the race to the court house ensued to beat the time of filing under Alabama’s Direct Action Statute. Ohio Casualty notes that the Defendants have not invoked their right under the direct action statute (Plaintiff’s Response Brief, p. 6, Note 4); however, before filing pursuant to Alabama’s Direct Action Statute the judgment in the trial court must be final. See Ala.Code 1975 § 27-23-2. Several post trial motions are pending, including the motion for new trial filed by Manifold and Jack. (Exhibit F). The judgment in State court is not final.

“(5) [W]hether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction;...” Id. There could be increased friction if the Federal Courts take a case like the present one that could have been resolved, or substantial questions could have been answered, in the trial court or through Alabama’s Direct Action Statute.

“(6) [W]hether there is an alternative remedy that is better or more effective;...” Id. Suit pursuant to the Alabama Direct Action Statute would be better and more efficient.

“(7) [W]hether the underlying factual issues are important to an informed resolution of

the case;...” Id. An understanding of the underlying factual issues is important to an informed resolution of the case. Obviously the Judge presiding over the State court proceedings is most familiar with the facts in this case. The facts presented at trial in State court are the facts determinative of the coverage issues.

“(8) [W]hether the state trial court is in a better position to evaluate those factual issues than is the federal court;...” Id. The State court would be in a better position to evaluate those factual issues, as it presided over the trial.

Under scrutiny of the Ameritas factors, Ohio Casualty’s complaint for declaratory judgment is due to be dismissed.

III. Ala.Code 1975 § 6-5-440.

In response to the second issue raised in Defendants’ motion to dismiss, Ohio Casualty argues that Ala.Code 1975 § 6-5-440 is not applicable to the present case. In support of this argument, Ohio Casualty argues that its motion for limited intervention has been withdrawn. However, at the time Ohio Casualty filed its complaint in the case at bar, Plaintiff still maintained its motion to intervene in the Lee County Case. Defendant’s were not aware Ohio Casualty had filed the present action. Ala.Code 1975 § 6-5-440 requires dismissal of Ohio Casualty’s complaint.

WHEREFORE, THE PREMISES CONSIDERED, Defendants pray this Honorable Court will dismiss Plaintiff’s complaint for declaratory judgment.

Respectfully submitted this the 28th day of December, 2006.

WHITTELSEY, WHITTELSEY & POOLE, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document on the parties listed below electronically or by placing a copy of the same in the United States mail, postage prepaid, to their correct address on this the 28th day of December, 2006.

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ORIGINAL

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IN THE CIRCUIT COURT
OF
LEE COUNTY, ALABAMA

WHITTELSEY PROPERTIES, INC.,
Plaintiff,

vs.

CIVIL ACTION AT LAW
CASE NO. CV-05-137

MANIFOLD CONSTRUCTION, LLC,
et al.,
Defendant.

* * * * *

PROCEEDINGS BEFORE THE HONORABLE BRADY
E. MENDHEIM, reported by Shannon M. Williams,
Certified Shorthand Reporter and Commissioner for
the State of Alabama at Large, in Courtroom One
at the Lee County Justice Center, 600 Gateway
Drive, Opelika, Alabama, on Thursday, November 2,
2006, commencing at approximately 9:00 a.m..

* * * * *



APPEARANCES

FOR THE PLAINTIFF:

DAVIS B. WHITTELSEY
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FOR THE DEFENDANT:

BRADLEY J. SMITH
ERIC D. BONNER
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(Whereupon, the proceedings
commenced as follows:)

THE COURT: The jury, through the
bailiff, has sent me the following
questions. Question one: Please
explain the verdict form. It
seems unclear.

Number two: Should we find
two figures on the fraud charge,
one for Manifold and one for Jack
Manifold -- Manifold Construction,
and one for Jack Manifold?

And three: Are mental anguish
damages and punitive damages --
are mental anguish and punitive
damages separate?

That one's pretty easy to
answer, the third. But I guess
while they're taking a break --

MR. WHITTELSEY: Read the first
question again, Your Honor?

THE COURT: Please explain the verdict
form. It seems unclear.

MR. POOLE: This is it.

MR. WHITTELSEY: Go ahead. The second

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question?

THE COURT: The second, should we find
two figures on the fraud charge,
one for Manifold Construction and
one for Jack Manifold?

MR. WHITTEELSEY: The answer is yes.

THE COURT: You could, yes.

Would the damages be separate
or would it be the same amount?

MR. WHITTEELSEY: On what?

THE COURT: That question number two.

MR. WHITTEELSEY: It would be separate.

THE COURT: It could be separate.

MR. WHITTEELSEY: They would have to be
separate because you've got a
fraud count against him as
individual defendant and fraud
count against Manifold
Construction, LLC, as a defendant.

THE COURT: I got you, yes.

MR. WHITTEELSEY: Then the third
question is quite easy. No.

THE COURT: Yes.

MR. WHITTEELSEY: So I guess what we
do --

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THE COURT: Where is the verdict form?

I probably need to talk to them
and make sure that I understood
what they think is unclear.

MR. POOLE: Let me ask this question of
everybody.

THE COURT: Let me see the verdict
form. Thank you.

MR. POOLE: We have a judgment as a
matter of law as to negligence
against the company, wantonness
against the company.

MR. SMITH: No.

MR. BONNER: Wantonness is a question
of fact and then there's not
wantonness as to Manifold.

MR. POOLE: Innocent and reckless fraud
against both of them? Those are
judgments as a matter of law?

MR. BONNER: Yes.

THE COURT: Let me ask y'all this. I
was thinking -- I could be wrong,
but I thought wantonness only went
as to Manifold Construction.

MR. WHITTELSEY: It does.

1 THE COURT: But the verdict form says
2 we, the jury, find in favor of the
3 plaintiffs and against the
4 defendant Manifold Construction,
5 LLC, and Jack Manifold
6 individually.

7 MR. WHITTELSEY: We need to take that
8 out.

9 MR. POOLE: That includes the fraud,
10 though, with the compensatory
11 damages.

12 MR. BONNER: Maybe what we need to do
13 is just put an addition in there
14 as to the wantonness.

15 MR. POOLE: And then we can do
16 separate -- you can do a separate
17 claim.

18 THE COURT: We probably need a verdict
19 form for the defense on the
20 wantonness claim. We don't have
21 it.

22 MR. SMITH: Right. That was my
23 concern.

24 MR. POOLE: Okay. So you want to
25 change it to where we just add the

1 wantonness in there or that they
2 find against each individual
3 defendant a certain amount?

4 THE COURT: I think we need to change
5 the first verdict form on here to
6 take Jack Manifold individually
7 out of it and then, otherwise, I
8 think it's okay. I'll tell them
9 that's --

10 MR. POOLE: Use that red pen and make
11 marks on it and I'll fix it. Are
12 we going to do a separate one for
13 fraud?

14 THE COURT: I'm going to do it one at a
15 time. I'm going read back to
16 y'all how I'm going to change --
17 again, we'll talk to them and make
18 sure we change the verdict form on
19 the first one. It will read: We,
20 the jury, find in favor of the
21 plaintiffs on their wantonness
22 claim and against the defendant
23 Manifold Construction, LLC, and
24 assess the plaintiffs'

25 compensatory damages at blank.

1 MR. POOLE: Say that again.

2 THE COURT: We, the jury, find in favor
3 of the plaintiffs on their
4 wantonness claim and against the
5 defendant Manifold Construction,
6 LLC, and assess the plaintiffs'
7 compensatory damages at blank.

8 MR. POOLE: That's going to be the new
9 thing under the first one. I
10 mean, that first part covers
11 negligence and fraud.

12 THE COURT: I thought we had a judgment
13 as a matter of law on negligence
14 and fraud.

15 MR. POOLE: I know. But they have to
16 assess damages somewhere. And
17 that's why we -- there's no
18 checkmark for which one you find
19 against on that one. They've
20 already -- that's why we had that
21 one, that liability is found on
22 that one. See what I'm saying?

23 THE COURT: I think we need to separate
24 that wantonness out and then do
25 another verdict form. We need to

1 do an additional verdict form that
2 simply says we, the jury, find in
3 favor of the defendant Manifold
4 Construction, LLC, on the
5 plaintiffs' claim of wantonness
6 because we did charge specifically
7 on -- it's up to them on that
8 issue.

9 MR. POOLE: But do we want to separate
10 out how they are to assess damages
11 in the fraud claim?

12 THE COURT: I think then we need a
13 third verdict form that says we,
14 the jury, assess compensatory
15 damages against Manifold
16 Construction, LLC, at blank. They
17 have got to put a figure on that
18 one. That's going to be the fraud
19 and the negligence.

20 MR. WHITTELSEY: Got to read that to me
21 again, Judge. Your proposal is?

22 MR. POOLE: You want to come stand over
23 my shoulder while we're in front
24 of the computer?

25 THE COURT: Let me tell you the

1 problem. What I just wrote out
2 would be a third possible verdict
3 form: We, the jury, assess
4 compensatory damages against
5 Manifold Construction, LLC, at
6 blank. Okay. I think if we do
7 that, I need to take out entirely
8 the verdict form that reads we,
9 the jury, find in favor of the
10 plaintiffs on their wantonness
11 claim and against the defendants
12 Manifold Construction, LLC, and
13 assess damages at -- compensatory
14 damages at blank. Get rid of that
15 one.

16 So, therefore, if -- and then
17 do another one that simply says
18 we, the jury, find in favor of
19 Manifold -- defendant Manifold,
20 LLC, on the plaintiffs' wantonness
21 claim.

22 All right. Here's what I
23 would -- Forget anything I just
24 said. I'm now proposing the first
25 two verdict forms. The first one,

1 again in no specific order, to:
2 We, the jury, find in favor of the
3 defendant Manifold Construction,
4 LLC, on the plaintiffs' wantonness
5 claim.

6 The second one: We, the jury,
7 find in favor of the -- we, the
8 jury, find in favor of the
9 plaintiffs on the wantonness
10 claim -- and at that point
11 assess.

12 Do a third one that says: We,
13 the jury, assess compensatory
14 damages against defendant
15 Manifold, LLC, at blank.

16 I would charge the jury you
17 have to answer that -- you've got
18 to put some figure there. We will
19 know whether wantonness is
20 included or not based on the
21 answer to the first two
22 questions. But regardless of yes
23 or no, they've still got to assess
24 a figure. So we will know, you
25 know, based on that.

1 And then, let's see the one
2 about punitive. Then I think the
3 other two about punitives are
4 okay.

5 MR. POOLE: Do you want to do a
6 separate compensatory for Jack
7 or --

8 MR. WHITTELSEY: No. Why would you --

9 MR. POOLE: Because they asked about
10 assessing different damages on
11 fraud.

12 THE COURT: Jack is in there only on
13 the fraud claim. So we do need a
14 different one for Jack.

15 MR. WHITTELSEY: Yes, but not on
16 compensatory. Only for the fraud.

17 MR. POOLE: For the fraud, yes,
18 compensatory and punitive.

19 MR. WHITTELSEY: That's true.

20 THE COURT: Let me go with what you've
21 got there. The one for Jack on
22 the fraud claim.

23 MR. POOLE: We can just do, we assess
24 compensatory damages against
25 Manifold, LLC, at blank.

1 We assess compensatory damages
2 against Jack Manifold at blank.
3 And we know the only thing against
4 Jack is the fraud and that's what
5 they were charged on, so that
6 ought to be okay.

7 THE COURT: I'm going to put, in
8 parentheses, fraud on Jack so that
9 I know as well, because I keep
10 forgetting actually.

11 MR. WHITTELSEY: That's fine with the
12 plaintiffs.

13 THE COURT: That's a question that must
14 be answered also. They have got
15 to put a figure there on Jack, and
16 that's the one that just for the
17 Record, I'm still not necessarily
18 convinced of, but I thought it
19 would be better to go ahead and
20 put it in. It's easier to knock
21 it out in a post-judgment motion.

22 MR. SMITH: Which one?

23 THE COURT: On Jack Manifold
24 individually on the fraud claim.

25 So leave the two punitive forms.

1 We think that's okay? I'm going
2 to leave the two punitive forms
3 like you have it on here. Then
4 I'm going to add four additional
5 verdict forms.

6 We, the jury, find in favor of
7 defendant Manifold Construction,
8 LLC, on the plaintiffs' claim of
9 wantonness. Just yes or no.

10 We, the jury, find in favor --
11 well, find in favor of the
12 plaintiffs on the wantonness
13 claim. Those would be the first
14 two forms.

15 MR. POOLE: You want that something
16 where they just check it?

17 THE COURT: Yes. I think that's fine.
18 Just do a check. Don't do a yes
19 or no because that's going to be
20 further confusion.

21 MR. POOLE: They will just have to
22 check one or the other.

23 THE COURT: Right.

24 Then we, the jury, assess
25 compensatory damages against

1 Manifold Construction, LLC.

2 That's number three.

3 Number four: We, the jury,
4 assess compensatory damages
5 (fraud) against defendant Jack
6 Manifold individually at blank,
7 number four.

8 Then the punitive clauses will
9 be five and six.

10 MR. POOLE: Do we want to separate
11 amounts for punitive damages? I
12 mean, so there's a punitive
13 against Jack, punitive against
14 Manifold, so if he was to go out
15 on a post-verdict motion?

16 MR. WHITTELSEY: See, I have a problem
17 with that, I mean, because the
18 defendants are jointly and
19 severally liable for the
20 judgment. I don't know why you're
21 breaking it apart. I'm kind of
22 reversing myself on breaking apart
23 the fraud or compensatory on --

24 THE COURT: But, actually, the way
25 you've written what will now be

1 verdict form five, they do choose
2 whether to assess punitive damages
3 against Jack or not.

4 MR. POOLE: Yes. Okay.

5 THE COURT: So they circle.

6 MR. POOLE: Right.

7 MR. WHITTELSEY: But they are jointly
8 and severally liable, okay.

9 There's no contribution among
10 joint tortfeasors, so you've got
11 the same actions. Why are we
12 separating out punitive damages?

13 MR. POOLE: We're not.

14 MR. WHITTELSEY: The question is: Do
15 you find Jack Manifold as guilty
16 of fraud individually? If they
17 do, then whatever damages
18 proximately flow from that fraud
19 go to either/or, go to both.

20 THE COURT: That's just it. I'm not
21 convinced that Jack is
22 individually liable on the fraud
23 claim. They had asked me to throw
24 it out. For that single reason
25 and perhaps others, but I know

1 that reason.

2 MR. WHITTELSEY: Well, so what? So if
3 you throw out Jack individually on
4 the fraud on a post-verdict and
5 you don't throw it out against
6 Manifold, the judgment -- the
7 number still sticks because
8 they're jointly and severally
9 liable. It's the same action.
10 It's identical.

11 THE COURT: You're probably right, but
12 I think just --

13 MR. SMITH: I would like to see it
14 typed up. I think the only thing
15 that may be of concern is they may
16 think, well, they can double up
17 the compensatory damages. That
18 would be the only problem.

19 MR. WHITTELSEY: There's another
20 reason. So why go into two
21 blanks? I mean, they either find
22 that Jack is liable for fraud
23 individually or they don't.

24 THE COURT: I've already ruled as a
25 matter of law at this point that

1 Jack committed a legal fraud. But
2 I'm not -- But what I'm saying on
3 the issue about him versus the
4 corporation, that's what causes me
5 concern.

6 MR. WHITTELSEY: But why are we
7 severing damages? Why does it
8 matter? Because they're jointly
9 and severally liable.

10 MR. POOLE: He's right about that.

11 THE COURT: I'm still not convinced of
12 the correctness of my ruling on
13 that issue. I want to be able, on
14 my post-judgment motion, to go
15 ahead and take him out.

16 MR. WHITTELSEY: But you still could,
17 because there's no question in
18 Alabama that Jack and Manifold
19 Construction, whatever the figure
20 is, are jointly and severally
21 liable under the fraud count for
22 compensatories and punitives. So
23 if you have one figure, number
24 one, you avoid any question of
25 there being a duplicity of

1 recovery. And if the Court gets
2 satisfied in post-trial motions
3 that Jack should not have gone in
4 as a defendant on the fraud case,
5 you simply direct verdict for him
6 or you dismiss it against him; the
7 judgment remains against the
8 corporation because the number is
9 joint and several liability. It
10 does not matter. Putting two
11 numbers down doesn't make sense.

12 MR. POOLE: What he's saying is with
13 the two numbers down, that would
14 be doubling damages, which you
15 don't want.

16 THE COURT: On the fraud claim only.

17 MR. WHITTELSEY: It doesn't make sense
18 because all you've got to do is
19 throw Jack out. Fraud claim only,
20 that's right.

21 THE COURT: Isn't it written up so if
22 there were punitive damages to
23 double up?

24 MR. POOLE: Punitive damages are where
25 you choose both one or the other

1 or neither.

2 THE COURT: And you're punishing both
3 separately.

4 MR. SMITH: Correct.

5 MR. WHITTELSEY: But why would we do
6 that? Because they're jointly and
7 severally liable anyway. Okay?

8 MR. POOLE: Because the question on
9 punitive damages is whether -- he
10 just does the judgment as a matter
11 of law as negligence and fraud..
12 Correct?

13 THE COURT: Right.

14 MR. POOLE: Wantonness was a question
15 for the corporation, but the
16 question for punitive damages, we
17 don't have a judgment as to a
18 matter of law on punitive damages,
19 so they have to decide we provided
20 clear and convincing evidence
21 against both one or the other or
22 neither, and they will circle. So
23 you're not going to take out the
24 punitive damages -- I mean, you're
25 not going to separate punitive

1 damages. They will tell us who
2 they're assessing the punitive
3 damages against.

4 THE COURT: I prefer, just my overall
5 thought process -- unless it gets
6 too confusing for the jury and for
7 us -- I prefer to have a little
8 bit too much information that I
9 can just ignore later if you're
10 right, which you may well be. And
11 then if you're right on that other
12 issue, I think I can fix that
13 without creating any other issues.

14 MR. POOLE: Well, see, I -- This is
15 where I agree with Davis. I think
16 you need to have one number for
17 compensatory damages and you need
18 to charge them that these people
19 can only be compensated -- I mean,
20 their damages are what their
21 damages are. I think if you have
22 two separate compensatory
23 damages --

24 THE COURT: I don't think we do.

25 MR. POOLE: -- that'll confuse them.

1 No. You said you wanted to assess
2 Jack, what you're going to find
3 are just compensatory damages
4 against Jack Manifold on the fraud
5 case. See, on your second one on
6 the yellow sheet there?

7 MR. WHITTELSEY: Guys, the defendants
8 are jointly and severally liable
9 period, and so --

10 THE COURT: I don't think the
11 compensatory is really the
12 problem.

13 MR. POOLE: Yes. You don't need to
14 double that. That's what I'm
15 saying.

16 MR. WHITTELSEY: You don't want to
17 split it. You're inviting error.

18 THE COURT: I think we're going to need
19 two separate lines with dollar
20 signs for Jack and Manifold on
21 punitive.

22 MR. POOLE: Davis? You hear that?

23 MR. WHITTELSEY: I did.

24 MR. POOLE: Okay. That's fine.

25 MR. POOLE: I'll do a checkmark-type

1 thing on them. I'll change it
2 that way.

3 THE COURT: Try that.

4 (Recess in proceedings from
5 9:22 until 10:03 a.m.)

6 THE COURT: Let's go ahead and bring
7 them back in, please.

8 (Jury enters courtroom.)

9 THE COURT: Good morning again. Let me
10 start out by apologizing for
11 keeping y'all back here. We have
12 been and, in fact, are still
13 working on some of the questions
14 that y'all have raised. We think
15 we almost have the issue about the
16 verdict forms resolved.

17 We did want to consult with
18 you and make sure that you didn't
19 have some of the same questions
20 that we realized that we had once
21 y'all came back and also slept on
22 it overnight.

23 That first verdict form,
24 through nobody's fault or all
25 three of our fault, theirs and

1 mine -- and, ultimately, the buck
2 stops with me, it's my decision --
3 sent back to you a very poorly
4 written verdict form. And I
5 apologize for that. That is my
6 fault. We are redoing the verdict
7 forms.

8 There's about one or two
9 issues that we're still trying to
10 work through to get that done.
11 But to go through some of the --
12 Let me talk for a second about a
13 couple of the other questions that
14 you had and come back to the
15 verdict forms.

16 The one about the third
17 question y'all wrote was, are
18 mental anguish and punitive
19 damages separate. Is that still
20 an issue that y'all want me to
21 respond to?

22 THE FOREPERSON: Yes.

23 THE COURT: The short answer is yes.

24 But understand, where mental
25 anguish damages come in are on

1 compensatory damages. It is one
2 element of compensatory damages.
3 You have to reach a number on
4 compensatory damages in this
5 case. That has to be done. I
6 want to be clear on that. The
7 amount is totally up to you based
8 on the evidence.

9 When it comes to mental
10 anguish damages, however, the law
11 states that there is no way that
12 anybody could put a specific
13 figure, for instance, like you can
14 on -- you know, if somebody you
15 know steals a car, you can put a
16 pretty specific figure on the
17 value of that car. But mental
18 anguish damages are something that
19 the law says that -- and you're
20 not, you know -- and the attorneys
21 aren't expected to put a specific
22 figure. But rather, it is for you
23 to consider and you to decide
24 based on all of the evidence in
25 this case.

1 You can choose not to give any
2 mental anguish damages and that
3 would be your decision, or you can
4 put a figure. When your verdict
5 comes back, we will never know
6 specifically whether y'all awarded
7 that or not because that question
8 is not asked of you. But it is
9 just, in fact, with anything to do
10 with compensatory damages, we will
11 not know how y'all arrived at that
12 figure.

13 In theory, you know, we may be
14 able to sit back down and go
15 through in tedious detail and
16 figure it out, but that's really
17 not important to us. We're just
18 interested in that final figure
19 that y'all arrive at.

20 And punitive damages are a
21 separate issue. And just -- and
22 there is no specific monetary
23 figure put on that either. It
24 just -- it is discretionary with
25 you. You do have the right,

1 unlike compensatory damages, to
2 give zero on punitive. You're not
3 being charged that you have to
4 award punitive damages. Rather,
5 if you determine, by clear and
6 convincing evidence under that
7 higher burden of proof that I went
8 over with you yesterday, then you
9 may award punitive damages, and
10 there will be a form on that on
11 the verdict form.

12 On the verdict form, I guess
13 I'll ask it to the Foreman,
14 anything specific that y'all had a
15 problem with? I think we all may
16 have had the same problems, but
17 I'm trying to find out if there's
18 something different. And we're
19 working on redoing the verdict
20 form. But anything y'all want to
21 at this point --

22 THE FOREPERSON: The wording of the
23 last section was almost
24 contradictory in our minds and the
25 whole thing was rather ambiguous.

1 THE COURT: We're completely revamping,
2 redoing the verdict form. At this
3 point, just ignore everything to
4 do with that old verdict form.
5 Any other questions that y'all
6 have other than the verdict form
7 at this time?

8 THE FOREPERSON: Yes. The damages
9 between Jack Manifold -- well, the
10 judgments against Jack Manifold
11 himself and the judgments against
12 the corporation itself, there was
13 some question on the way it was
14 worded on the form as -- I'm
15 trying to remember exactly how it
16 was worded, but we were unsure as
17 to what applied.

18 THE COURT: Right. That is one of the
19 issues we're still contemplating
20 or working actively on redoing the
21 verdict forms. Give us hopefully
22 just a few more minutes.
23 Actually, what takes a little bit
24 of time is we do like to type
25 these up, not just that it looks

1 nice, but you won't be able to
2 read any of our handwriting in
3 such a way -- I am going to bring
4 you back in when we finish with
5 that new verdict form and go back
6 over it with you, and that should
7 address that issue. Anything
8 else?

9 THE FOREPERSON: Yes. Could you reread
10 us the definition of wantonness?

11 THE COURT: Wantonness. Wantonness.

12 I've packed all this up. Okay.
13 Wantonness is the conscious doing
14 of some act or omission, under
15 knowledge of existing conditions,
16 and consciousness that, from the
17 doing of such act or omission of
18 such duty, an injury will likely
19 or probably result. Before a
20 party can be said to be guilty of
21 wanton conduct, it must be shown
22 that with reckless indifference to
23 the consequences, he either
24 consciously and intentionally did
25 some wrongful act or consciously

1 omitted some known duty which
2 produced injury.

3 When I charged you, because
4 it's easier for me -- and I hope
5 for the jury, I always break that
6 down into elements numbered one,
7 two, three, each to your
8 reasonable satisfaction. Let me
9 give you that again also.

10 The breakdown of those
11 sentences that I just read stated
12 another way: If the plaintiff
13 proves each of these three things
14 to your reasonable satisfaction,
15 then you would return a verdict of
16 wantonness. If any one or more is
17 not proven to your reasonable
18 satisfaction, you could -- excuse
19 me -- you could not return a
20 verdict for the plaintiffs on
21 wantonness, and you would have to
22 return a verdict in favor of the
23 defendant Manifold Construction,
24 Incorporated, on wantonness.

25 The first element is the

1 conscious doing of an act or
2 omission; second, knowledge of the
3 existing conditions; and, three,
4 conscious or aware that such act
5 or omission will likely result in
6 damages. Is that okay?

7 THE FOREPERSON: Yes. And could you
8 also read the definition for fraud
9 and negligence?

10 THE COURT: Okay. Now, keep in mind
11 that on the fraud and negligence
12 we have already ruled as a matter
13 of law based on Jack Manifold's
14 candid admissions on the witness
15 stand. While he may not -- Those
16 are legal terms of art. But what
17 he admitted to, he admitted
18 liability on those issues, so
19 that's not for your
20 consideration. Not that I
21 wouldn't mind reading it to you,
22 but you, the jury, are not free to
23 go back there and say that Jack
24 Manifold or Manifold,
25 Incorporated, is not guilty of

1 fraud or negligence. Legally,
2 that was admitted in open court,
3 and so really the only issue is
4 damages. He has not admitted to
5 the damages that the plaintiffs
6 are claiming. They have admitted,
7 I think I'm not mistaken, to
8 saying this to some damages but
9 not to what the plaintiffs are
10 claiming. So that is an issue in
11 dispute for you to determine both
12 as to compensatory damages. And
13 he has not admitted liability for
14 punitive damages at all, so that
15 would also be for your
16 consideration.

17 Anything else other than the
18 verdict form issues that I can
19 help y'all with at this time?

20 THE FOREPERSON: That's it, I believe.

21 MR. SMITH: Judge, may I approach real
22 quick?

23 THE COURT: I need to consult with the
24 attorneys first on what I just
25 told you.

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(Bench conference held out of
the hearing of the jury.)

MR. POOLE: If we could have that jury
charge 16 and 18 read, that it
does not have to be intentional
and --

THE COURT: That's what I was looking
for, H. I didn't throw anything
away. Because that was a good
charge.

MR. SMITH: Judge, I would just ask in
response to the questions about
the damages against Jack and
Manifold, that they be instructed
that the compensatory damages go
to both the corporation and to him
individually. I don't think that
was clear.

THE COURT: I thought -- well, what --
I thought Davis was thinking about
just dropping --

MR. SMITH: That's on punitive. I
think the compensatory damages, I
don't think that was clear.

1 MR. WHITTELSEY: We're not going to
2 drop the punitive. I'm working on
3 the verdict form.

4 THE COURT: But the compensatories
5 would be the same --

6 MR. SMITH: But I don't think they
7 understood that they were going to
8 both the corporation and to the
9 individual.

10 THE COURT: -- whatever figure they
11 arrived at.

12 MR. POOLE: I think he's asking you to
13 instruct them that compensatory
14 damages are what they are. You
15 can only compensate one time. I
16 think that's what --

17 MR. SMITH: But they are as to both the
18 corporation and the individual --

19 THE COURT: Okay. I'll do that.

20 MR. SMITH: -- in response to their
21 question.

22 THE COURT: Any problem with that?

23 MR. POOLE: No. That's fine.

24 (Return to open court.)

25 THE COURT: Let me mention two other

1 matters. Back to the wantonness
2 charge that I gave you -- and I
3 couldn't lay my hands on it and I
4 did just find it -- but this is a
5 good and correct statement of the
6 law. To prove wantonness, it is
7 not essential for the plaintiff to
8 prove that the defendant
9 entertained a specific decision or
10 specific intent to injure the
11 plaintiff. Okay.

12 Now then, also let me mention
13 to you -- and this will also come
14 back in the verdict form on the
15 issue about compensatory damages
16 against -- Yes, sir?

17 THE FOREPERSON: Could you repeat the
18 last statement about wantonness,
19 please?

20 THE COURT: Yes. To prove wantonness,
21 it is not essential or required
22 that the plaintiff prove that the
23 defendant entertained a specific
24 design or specific intent to
25 injure the plaintiff. But keep in

1 mind, it is more than mere
2 negligence, just breaching a
3 duty. It requires a consciousness
4 or an awareness in the mind of the
5 circumstances based on the
6 elements that I outlined to you.
7 Everybody got that on the
8 wantonness?

9 On the issue about
10 compensatory damages between
11 Manifold, Incorporated, and Jack
12 Manifold individually, you will
13 only award one figure that will be
14 applied to both of them.
15 Technically under Alabama law -- I
16 don't want to further confuse it,
17 so if you think this confuses you,
18 put it out of your mind.

19 But in this situation, they
20 are both called jointly and
21 severally liable. You can't
22 distinguish the two under these
23 circumstances. For instance, the
24 contracts that -- with the mental
25 anguish damages with Sheldon

1 Whittelsey and his company, you
2 can distinguish those two. Not
3 that that's necessarily important
4 on the issue of mental anguish,
5 even though basically Sheldon
6 Whittelsey and his company are one
7 and the same, just like Jack
8 Manifold and Manifold Construction
9 are the same, on some issues they
10 go completely together. All
11 issues regarding compensatory
12 damages in this case, they will go
13 together. Punitive damages will
14 be different. And I'll discuss
15 that when we get the verdict forms
16 rewritten to address that issue.

17 So -- and I don't want to even
18 throw out just any specific
19 figure, but whatever -- you will
20 arrive at a figure. You are being
21 charged to do that. And the blank
22 for that is just going to have one
23 blank but refer to both
24 defendants. So it's going to be
25 one amount. And that's how you

1 would calculate it.

2 Anything else at this time
3 other than the verdict forms that
4 I can help y'all with?

5 THE FOREPERSON: That seems to satisfy
6 everyone.

7 THE COURT: Okay. I'm going to send
8 y'all back. Or if you want to
9 take a break, either way. Give us
10 five or ten more minutes to get
11 them, because we have to rewrite
12 them in here, get both parties and
13 myself in agreement on the
14 verbiage, then get it over to the
15 secretary to get her to type it
16 up. Then we have to get her to
17 come back and reread it, because I
18 think I noticed what's one error
19 in the draft. Give us a few more
20 minutes on that. I'm going to
21 bring you back out and go over the
22 new verdict forms with you then.
23 Okay. Thank y'all.

24 (Jury exits the courtroom.)

25 THE COURT: Let me put something else

1 real quick on the record. Just
2 for the record, based on the
3 instruction I just finished, is
4 the plaintiff satisfied at this
5 point?

6 MR. WHITTELSEY: Yes, sir.

7 THE COURT: Is the defense satisfied?

8 MR. SMITH: Yes, sir.

9 MR. WHITTELSEY: Your Honor, before we
10 get going, I would like to read
11 what I would propose would be a
12 jury verdict form. I have been
13 sitting here working on it.

14 THE COURT: Different from this one?

15 MR. WHITTELSEY: Very different.

16 Because I think -- this is how I
17 think this thing ought to go now.
18 Let's start with -- let's start at
19 the top of the verdict form, let's
20 start negligence. There's a
21 judgment as a matter of law. We,
22 the jury, award blank in
23 compensatory damages against
24 defendant Manifold Construction,
25 LLC, on the negligence claim,

1 period.

2 Middle of the page.
3 Wantonness. We, the jury, find
4 that defendant Manifold
5 Construction, LLC, is -- with a
6 blank, to be checked or left
7 blank, comma -- or is not, with a
8 blank, guilty of wantonness as
9 charged.

10 Okay. Middle of the page. If
11 you find Manifold Construction,
12 LLC, is guilty of wantonness as
13 charged, then you go further. And
14 then it would read: We, the jury,
15 award blank in compensatory
16 damages against Manifold
17 Construction, LLC. And we, the
18 jury, award blank in punitive
19 damages against Manifold
20 Construction, LLC. That gets rid
21 of the negligence. That gets rid
22 of the wantonness.

23 Then you go to the middle of
24 the page. You put fraud. We, the
25 jury, assess blank in compensatory

1 damages against defendants
2 Manifold Construction, LLC, and
3 Jack Manifold. So you've got one
4 form.

5 And then you go -- and then
6 you -- middle of the page. Fraud,
7 paren, punitives. We assess blank
8 in punitive damages for the fraud
9 claims against Manifold
10 Construction, LLC, and we assess
11 blank in punitive damages for the
12 fraud claims against Jack Manifold
13 individually, period. You're
14 done. You've covered everything.

15 THE COURT: The only question I pose to
16 you is the issue about a double
17 award for compensatory damages for
18 negligence and wantonness.
19 Basically, the damages are going
20 to be the same.

21 MR. WHITTELSEY: Put it on there. Put
22 it on there. If you want to,
23 then, go in -- but you've got to
24 have a finding -- well, then flip
25 it. Make the first thing

1 the award -- the first question --
2 make the first question
3 wantonness. Put it in front of
4 negligence, okay, and have it read
5 we, the jury, find that defendant
6 Manifold Construction, LLC, was
7 with a blank, was not guilty of
8 wantonness as charged, period.

9 Middle of the page. If was
10 not, go no further on wantonness.
11 If was, move further. Okay.

12 Then you go in and you put --
13 you know, if it was, you put the
14 negligence and the wantonness
15 together. On the claims of
16 negligence and wantonness, we
17 assess compensatory damages
18 against Manifold Construction,
19 LLC, in the amount of blank. On
20 the wantonness claim, we assess
21 the amount of punitive damages
22 against Manifold Construction,
23 LLC, in the amount of blank. And
24 you can put a paren or an asterisk
25 by it. Don't fill in this blank

1 if you found that they're not
2 wanton.

3 THE COURT: Instead of doing the blank
4 for -- Keep that thought you just
5 gave me, but let me throw this one
6 out. Under the yes, we have found
7 wantonness, basically just put in
8 a phrase and the compensatory
9 damages are covered by our finding
10 on the negligence claim.

11 MR. WHITTELSEY: Or better yet, why
12 don't we do this?

13 THE COURT: Or they don't put a figure
14 in. They will put one in for the
15 negligence if you do that.

16 MR. WHITTELSEY: Why don't we do this?
17 Why don't we bring them back in
18 and say, ladies and gentlemen,
19 we're going to do this in a
20 bifurcated manner. Here's your
21 jury form on wantonness. Do you
22 or do you not find that Manifold
23 Construction, LLC, is guilty of
24 wantonness. Yes or no.

25 If they answer no, we have

1 just simplified this thing
2 tremendously. If they answer yes,
3 we've simplified it tremendously.

4 THE COURT: I don't --

5 MR. SMITH: I just think that's all
6 getting way, way too confusing for
7 this jury.

8 MR. WHITTELSEY: Well, I'm just giving
9 options.

10 MR. SMITH: I mean, it seems like the
11 compensatory damages are the same
12 on any of them, right? And if we
13 put it more than once, I think
14 that's going to confuse them where
15 they think they can award it
16 twice.

17 THE COURT: Why don't we do -- either
18 of those forms that Davis just
19 suggested -- I don't have a
20 problem with this form either.
21 But instead of putting a blank for
22 compensatory damages for
23 wantonness, just have it phrased,
24 you know, for the one where they
25 found it, just go ahead and type

1 in, you know, for compensatory
2 damages the findings are the same
3 as for the negligence. Because if
4 they find wantonness, the damages,
5 my understanding from the facts,
6 are the exact same compensatory
7 damages as they are for the
8 negligence.

9 MR. WHITTELSEY: That's right. The
10 only issue is punitives.

11 THE COURT: Let me do this. I charge
12 them and tell them it's all the
13 same, then they have two options.
14 If there's a blank, they can put a
15 zero, and that can mean two
16 different things; they really
17 didn't find wantonness or they're
18 referring back to the previous
19 award on the negligence. Or they
20 can put in the same figure as the
21 negligence and either it's a
22 double recovery or they're
23 intending simply to restate what
24 has already been stated. And
25 either way, that's going to lead

1 to potentially, you know, with an
2 appeal or something, further
3 confusion on that issue.

4 MR. SMITH: Well, isn't it just easier
5 the way we were going where if
6 they find on the wantonness count,
7 and then they put their amount in
8 for compensatory damages, and then
9 just -- and then I would object --
10 I don't even think all the clear
11 and convincing evidence verbiage
12 is necessary. They find punitive
13 damages.

14 MR. WHITTELSEY: They've been charged
15 on that.

16 MR. SMITH: I think it's as simple as
17 that.

18 THE COURT: My preference at this -- if
19 y'all want to retype it --

20 MR. POOLE: I've got it saved on
21 computer over there so it's no
22 problem at all.

23 THE COURT: Is Manifold Construction,
24 they're a corporation --

25 MR. BONNER: They're an LLC.

1 MR. SMITH: They are an LLC.

2 THE COURT: It's Whittelsey that's -- I
3 keep -- Okay. So they're the LLC,
4 okay. Let's work off the one we
5 already have. We, the jury --

6 MR. POOLE: Use that red pen up there,
7 Judge.

8 MR. WHITTELSEY: May I be excused to go
9 upstairs before the presiding
10 judge does something bad to me?

11 THE COURT: Yes. That first one was
12 okay.

13 MR. SMITH: I think so.

14 THE COURT: So we'll go with the first
15 one. We're going to do that.

16 MR. SMITH: And then I think on the
17 second one all you need is we, the
18 jury, and then you can take out
19 the rest of the spiel --

20 THE COURT: Davis --

21 MR. SMITH: -- about compensatory
22 damages. I think that's all you
23 need, isn't it? Well, no, we can
24 leave that in, that's fine,
25 because actually I do want that

1 language. You're right. And then
2 we, the jury, find --

3 THE COURT: Are y'all wanting punitives
4 on Jack?

5 MR. POOLE: We've got to put in Jack.
6 They'll check.

7 THE COURT: I think the only thing you
8 need to change is put in Jack on
9 the punitive.

10 MR. SMITH: I think that's already
11 there, isn't it?

12 MR. POOLE: No, no, no. On that form,
13 we didn't have Jack.

14 THE COURT: We want separate punitive
15 blanks for the two defendants but
16 only one for the compensatory.

17 MR. SMITH: Yes. Maybe put "or"
18 there. And then take out --

19 MR. WHITTELSEY: But you have to have
20 an area in there, Judge, that they
21 make a finding concerning the
22 wantonness claim.

23 THE COURT: That's the first thing.

24 MR. POOLE: Davis.

25 MR. WHITTELSEY: Sir?

1 MR. POOLE: One amount for punitive
2 damages against the company, one
3 amount for punitive damages
4 against Jack?

5 MR. WHITTELSEY: That's correct.

6 MR. POOLE: I got it.

7 MR. BONNER: The only thing I saw,
8 Bobby, is -- I think you and I
9 goofed on this when we were going
10 back. Originally, we had the
11 "or," but we need to just add
12 those back in.

13 MR. POOLE: No, I just didn't do "or"
14 because they're going to check one
15 or the other. That's why we say
16 mark appropriate box, so there's
17 not an "or."

18 MR. BONNER: I didn't know if it would
19 confuse them or not.

20 MR. SMITH: Just leave these like they
21 are.

22 MR. POOLE: I'll take out your
23 verbiage.

24 THE COURT: We can be off.

25 (Discussion held off the

record.)

THE COURT: Let's go back on the
record. At this point,
Mr. Whittelsey says he's satisfied
with the verdict form. Is the
defense satisfied?

MR. SMITH: Satisfied.

THE COURT: Everyone agree?

MR. WHITTELEY: Plaintiff is
satisfied, Your Honor.

(Jury enters the courtroom.)

THE COURT: Okay. We hope we have a
better verdict form for y'all.
You'll have this to go back there,
but I'm just going to briefly go
over it with you. It is pretty
self-explanatory. The first issue
up here at the top -- the order is
not necessarily that important,
but the first issue is either you
find for the plaintiff or for the
defendant on the wantonness
claim. It is just a yes or no.
Don't check both boxes. Just
check the one, either yes --

1 basically yes or no. We, the
2 jury, find in favor of the
3 plaintiffs; or we, the jury, find
4 in favor of the defendant.
5 Manifold Construction, LLC, is the
6 only named defendant on that
7 claim, not Jack Manifold
8 individually.

9 The next thing we need y'all
10 to tell us is, we, the jury,
11 assess plaintiffs' compensatory
12 damages at blank. Y'all have to
13 put a figure there based on the
14 negligence and the fraud issues.
15 Even if you find for the defendant
16 on the wantonness claim, we still
17 need to know the total lump sum.
18 Don't break it down. Lump sum of
19 compensatory damages, what I went
20 over with you to actually
21 compensate the plaintiff for the
22 damages that y'all find that they
23 have legitimately and legally
24 suffered. That would also -- if
25 you find mental anguish, that

1 would be in that total lump sum.
2 Just add it all up, give us a
3 single figure. We don't need a
4 breakdown. If you find in favor
5 of the wantonness, that figure is
6 going to include your damages on
7 the wantonness as well, that lump
8 sum.

9 As a practical matter -- and I
10 don't want to add further
11 confusion -- since the negligence
12 and wantonness both involve the
13 same set of facts, the damages are
14 really going to be the same. The
15 compensatory damages. I don't see
16 how you can, you know, separate
17 those really, but we still need to
18 know the answer to these
19 questions.

20 The next two issues deal with
21 the punitive damages issues. And
22 the first is if you find, by clear
23 and convincing evidence, to award
24 punitive damages against Manifold
25 Construction, LLC, there's a blank

1 for you to put a figure there.

2 If you find Jack Manifold
3 liable for punitive damages,
4 there's a blank for him. Just
5 because you assess against one
6 does not mean that you have to
7 assess against the other. Follow
8 the law and your sound judgment on
9 those issues. I'm not suggesting
10 you answer one way or the other.
11 I just want to make sure we're all
12 on the same page on this.

13 And then the contra: If you
14 don't find as to one or both,
15 that's that final question, and we
16 basically know that by your
17 answering the first, but we want
18 to make sure we're clear on the
19 punitive damages issue.

20 Let me also mention that if
21 you go back and, for whatever
22 reason, you're confused about
23 either what I have told you or
24 about the verdict forms, please
25 don't hesitate to come back and

1 let's try it again, because
2 everybody wants everybody to be
3 clear on what y'all are doing. In
4 your collective groups, we have to
5 deal with you collectively. We
6 can't go back and find out
7 individually what you were
8 thinking. At this point, on the
9 verdict form and my explanations,
10 is the plaintiff satisfied?

11 MR. POOLE: Need to approach just on
12 one thing, Judge.

13 (Bench conference held outside
14 the hearing of the jury.)

15 MR. POOLE: Just on the form, if you
16 tell them if they mark both of
17 them on this, that wouldn't even
18 go down on this. If they don't
19 mark on this, they are not going
20 to sign this. You see what I'm
21 saying? Just that clarity.

22 MR. SMITH: That's fine.

23 THE COURT: Okay. And this is really
24 for the Foreman. But understand
25 on this, the way we phrase the

1 punitive damages is that if you
2 find punitive damages as to both
3 defendants and you put two
4 figures, one for each defendant,
5 you don't need to answer the
6 bottom question or sign it.

7 By the same token, if you find
8 no punitive damages for either
9 defendant, you don't need to sign
10 this one. Just do the bottom. I
11 think you'll see that that's
12 self-explanatory when you get back
13 there. But again, if there's any
14 confusion, please let us know
15 while we're all still here.

16 At this point, is the
17 plaintiff satisfied?

18 MR. POOLE: Yes, sir.

19 MR. WHITTELEY: Yes, Your Honor. Let
20 me -- I just need to make one
21 statement to the Court. Ladies
22 and gentlemen, I'm an
23 insulin-dependent diabetic, and
24 that's the reason I've had a Diet
25 Coke or a Coke brought to me. I

1 just want y'all to know that,
2 okay. It's not disrespectful to
3 the trial.

4 THE COURT: Is the defense satisfied as
5 well?

6 MR. SMITH: Yes, Your Honor.

7 THE COURT: Are there any questions at
8 this point that y'all have about
9 the verdict forms or what I just
10 told you or any other issues that
11 anybody wants to ask while y'all
12 are out here?

13 THE FOREPERSON: That seems to have
14 cleared everything up. Thank
15 you.

16 THE COURT: And with that, we'll give
17 you the verdict form and let you
18 go back, and we'll wait on your
19 decision.

20 (Jury exits the courtroom.)

21 THE COURT: Let's see. Mr. Oliver, you
22 are the Foreman; is that right?

23 THE FOREPERSON: Yes, sir.

24 THE COURT: For the Record, you've
25 handed me the verdict and I will

1 go over the verdict. We, the
2 jury, find in favor of the
3 plaintiffs and against defendant
4 Manifold Construction, LLC, on
5 plaintiffs' wantonness claim. We,
6 the jury, assess plaintiffs'
7 compensatory damages at \$275,000.

8 We, the jury, find that the
9 plaintiffs have proven their claim
10 for punitive damages against the
11 following defendants, Manifold
12 Construction, LLC, and assess
13 punitive damages at \$1.5 million,
14 one and a half million dollars;
15 and against Jack Manifold
16 individually, and assess punitive
17 damages at \$1 million.

18 And, Ladies and Gentlemen,
19 what I need to do at this time is
20 poll you. And I hate to point at
21 you. That's the easiest way. I'm
22 going to start right here, just
23 work my way down and back across.
24 And I'll simply be asking if this
25 is your verdict. If it is, would

1 you just state affirmatively,
2 yes. If not, please let me know.
3 Is it your verdict?

4 JUROR: Yes.

5 JUROR: Yes.

6 JUROR: Yes.

7 JUROR: Yes.

8 THE COURT: Yours?

9 JUROR: Yes.

10 JUROR: Yes.

11 JUROR: Yes.

12 JUROR: Yes.

13 JUROR: Yes.

14 JUROR: Yes.

15 JUROR: Yes.

16 THE COURT: And let the Record show
17 that each juror has stated in the
18 affirmative. Anything from the
19 plaintiff at this time?

20 MR. WHITTELEY: No, Your Honor, not at
21 this time.

22 THE COURT: Anything from the defense
23 at this time?

24 MR. SMITH: Nothing.

25 THE COURT: At this time, if you don't

1 mind, go back to the jury room,
2 hopefully for just a minute, and
3 let me take up something, and then
4 we will let you know. I'm not
5 going to keep you back there
6 hopefully more than just a couple
7 minutes without knowing
8 something. So if you don't mind,
9 just go back with the bailiff. If
10 you need to go to the restroom or
11 something, that's fine.

12 (Jury exits the courtroom.)

13 THE COURT: I guess we need to, at
14 least for the Record, take up, I
15 guess, the Intervenor's issue. Do
16 y'all want to address that while
17 we still have the jury or -- let
18 me just do this, officially just
19 ask for a response from them.

20 For the Record, just state
21 your name and, also, who your
22 client is.

23 MR. MCILWAIN: I'm Chris McIlwain. I
24 represent Ohio Casualty Insurance
25 Company, which has a pending

1 Motion to Intervene that's not
2 been ruled upon, so we are not a
3 party to the case.

4 THE COURT: Based on the verdict, are
5 y'all asking for anything at this
6 time or --

7 MR. MCILWAIN: Well, I will -- Let me
8 put it this way: As long as the
9 parties do not ask for any special
10 interrogatories, I will not
11 either; and, therefore, will
12 withdraw my Motion to Intervene.

13 THE COURT: That's withdrawn. Anything
14 else from the plaintiff at this
15 time?

16 MR. WHITTELSEY: One moment, Your
17 Honor.

18 I've got to hear the statement
19 again, offer again from the
20 proposed intervenor.

21 THE COURT: He says that he's
22 withdrawing, I guess, his Motion
23 to Intervene.

24 MR. WHITTELSEY: Well, Your Honor, our
25 statement on that is this, is that

1 we do not plan to submit special
2 interrogatories to the jury.
3 However -- and we don't plan to
4 submit special interrogatories to
5 the jury. But on the issue of
6 their withdrawing their motion to
7 intervene, that's up to them, and
8 we don't -- we neither accept it.
9 We just -- that's up to them.

10 THE COURT: I guess at this point, I'm
11 basically needing to know from the
12 plaintiff, is there a problem with
13 me discharging the jury at this
14 time from the plaintiffs'
15 standpoint?

16 MR. WHITTELEY: No, sir.

17 THE COURT: Okay. From the defense
18 standpoint, can I discharge the
19 jury?

20 MR. SMITH: Yes. I guess -- Yes, sir,
21 Your Honor.

22 THE COURT: I'm just going to tell
23 them -- You want me to ask them to
24 come back in? Does anybody know,
25 do they need to contact the clerk

1 or are they just free to go? Do
2 you know, sheriff?

3 THE BAILIFF: As far as I know, they
4 would be free to go, and the clerk
5 will mail them their check. If
6 they would like, they could step
7 to the clerk's office, those that
8 want to go by there.

9 (Jury enters the courtroom.)

10 THE COURT: The good news at this point
11 is I'm discharging you from
12 further service. I do want to
13 thank you all. I know that you
14 have been very conscientious about
15 your duties. That's been obvious
16 to everyone. And I do truly
17 appreciate you and thank you for
18 your service. It is a very
19 important form of citizenship.
20 You are discharged at this time.
21 I'm not sure of the exact
22 procedure. My understanding is
23 your jury service is finished.
24 You're free to go back about your
25 home or work. The clerk will mail

1 you your checks. Or I'm told if
2 you want to stop by the clerk's
3 office, you know, they may be able
4 to prepare your juror check now.
5 I just don't know since I'm not
6 normally assigned here. With
7 that, thank you for your service,
8 thank you for your verdict, and
9 y'all are free to go. Okay.
10 Thank y'all. Good luck to you.

11 (Jury exits the courtroom.)

12 THE COURT: I have entered the verdict
13 for the Record by signing the
14 bottom of the verdict form. Is
15 there anything else from the
16 plaintiff at this time?

17 MR. WHITTELEY: No, sir, not at this
18 time.

19 THE COURT: Anything else?

20 MR. SMITH: Judge, we would obviously
21 seek a remittitur in that it
22 doesn't comply with the punitive
23 damage statute in that it's much
24 over three times compensatory
25 damages.

1 THE COURT: I guess the best thing,
2 just a follow-up brief, file a
3 written motion is probably going
4 to be best at this point, and get
5 it to me. And, you know,
6 presumably, we may have to have a
7 subsequent hearing on that, but I
8 guess just prepare the motion and
9 we will consider that
10 accordingly. Anything else?
11 Okay. That's it. Good luck to
12 y'all.

13 (The proceedings concluded at
14 11:58 a.m.)

15 * * * * *

16 END OF PROCEEDINGS

17 * * * * *

1 REPORTER'S CERTIFICATE


2 STATE OF ALABAMA

3 MONTGOMERY COUNTY

4 I, Shannon M. Williams, Certified
5 Shorthand Reporter and Commissioner for the State
6 of Alabama at Large, hereby certify that on
7 November 2, 2006, I reported the TESTIMONY AND
8 PROCEEDINGS in the matter of the foregoing cause,
9 and that pages 1 through 65 contain a true and
10 accurate transcription of said proceedings. Only
11 the aforementioned page numbers will change on
12 completion of the final appeal transcript, along
13 with insertion of an index on the appearance
14 page.

15 I further certify that I am neither kin
16 nor of counsel to the parties to said cause, nor
17 in any manner interested in the results thereof.

18 This 30th day of November, 2006.

19 
20 SHANNON M. WILLIAMS, CSR
21 Commissioner for the
22 State of Alabama at Large

23 MY COMMISSION EXPIRES: 1/14/2010
24
25

HUBBARD, SMITH, MCILWAIN, BRAKEFIELD & BROWDER, P.C.

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April 20, 2006

Hon. Bradley E. Mendheim
Houston County Circuit Court
P. O. Box 6406
Dothan, AL 36302-6406

COPY

RE: *Whittelsey Properties, Inc., et al. v. Manifold Construction, LLC, et al.*
Lee County Case No.: CV-05-137
Our File: 36618

Dear Judge Mendheim:

At the conclusion of the hearing on April 17 in this case, you requested the parties to forward to you any additional cases that they felt were pertinent.

As the cases cited to the Court by counsel for the Plaintiff indicate, a decision whether to grant or deny a pre-verdict motion for permissive intervention under 24(b) is discretionary with the trial court, and you have probably noticed that our appellate courts have almost uniformly affirmed whatever that decision was.

Ever since *Alabama Hospital Association Trust v. Mutual Assurance Society*, 538 So.2d 1209 (Ala. 1989), which held that juror affidavits are not admissible to explain a jury's rationale behind a general verdict, it has been my experience that an increasing number of trial judges have exercised that discretion in favor of intervention. Today, I believe that limited intervention of the type sought by Ohio Casualty (as opposed to "Universal Underwriters" intervention of the type first proposed in *Universal Underwriters Ins. Co. v. East Central Alabama Ford-Mercury, Inc.*, 574 So.2d 716 (Ala. 1990) cited by counsel for the Plaintiffs) is denied only in exceptional circumstances.



Hon. Bradley E. Mendheim
April 20, 2006
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As discussed at the hearing, the circumstances of this particular case are tailor-made for limited intervention given that a general verdict in favor of the Plaintiffs may forever obscure the components of that verdict and possibly result in an absence of liability insurance coverage for that verdict.

For example, coverage under the Ohio Casualty policy is limited to "bodily injury" and "property damage" (as those terms are defined in the policy) caused by an "occurrence" (defined as a "accident"). The term "occurrence" does not include situations where damage is expected or intended by an insured. *Alfa Mut. Ins. Co. v. Meroney*, ____ So.2d ____ 2005 WL 1532322 (Ala. Civ. App. 2005) (copy enclosed). The term "property damage" does not include economic loss, *American States Ins. Co. v. Martin*, 662 So.2d 245, 248 (Ala. 1995) (copy enclosed) and property damage coverage is further limited by certain exclusions.

However, the Plaintiffs are asserting claims for intentional wrongs and unintentional wrongs, and are also asserting claims for economic loss and other types of damage which are not covered. If the jury returns a general verdict, it will be impossible to determine what, if any, portion of that verdict is covered. One possible outcome of this is that no portion of the verdict will be covered and that the trial of the case would have been in vain.

I recognize that counsel for the litigants have followed their initial instinct in objecting to anything that a liability insurer might propose despite the absence of prejudice to their positions. However, given that Ohio Casualty's *limited* intervention will not alter their preparation or trial of this case; that you will be the final arbiter on

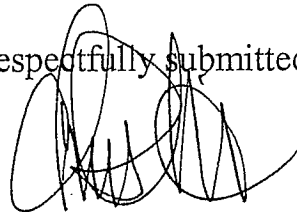
Hon. Bradley E. Mendheim

April 20, 2006

Page 3

what interrogatories are propounded to the jury, and that answers to those interrogatories will effectively determine whether the Plaintiffs will actually receive any compensation, I submit that intervention is an absolute necessity.

Respectfully submitted,

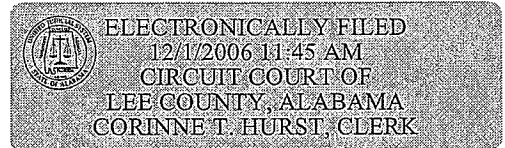
A handwritten signature in black ink, appearing to read 'Christopher Lyle McIlwain', written over the words 'Respectfully submitted,'.

Christopher Lyle McIlwain

CLM/brs

Enclosure

cc: Davis B. Whittelsey
James Don McLaughlin
Bradley J. Smith
Court Clerk



IN THE CIRCUIT COURT OF LEE COUNTY, ALABAMA

WHITTELSEY PROPERTIES, INC.,)
et al.,)

Plaintiffs,)

v.)

MANIFOLD CONSTRUCTION, LLC,)
et al.,)

Defendants.)

CV-05-137

DEFENDANTS' MOTION FOR A NEW TRIAL

COME NOW the Defendants, Manifold Construction, LLC and Jack Manifold (the "Manifold Defendants"), and move this court for a new trial due to errors which prejudiced the Manifold Defendants. In support of their motion, the Manifold Defendants state as follows:

Plaintiffs' claims involve work performed on a residential construction development in Opelika, Alabama. Plaintiffs allege the Manifold Defendants' improper workmanship caused a host of damages to the development. The trial began on October 30, 2006, and concluded on November 2, 2006, at which time the jury awarded a verdict in favor of the Plaintiffs in the total amount of \$2,775,000 in both compensatory and punitive damages. This award consisted of \$275,000 in compensatory damages, \$1.5 million in punitive damages against Manifold Construction, and \$1.0 million in punitive damages against Jack Manifold, individually.

The Manifold Defendants move for a new trial based upon certain grounds which were prejudicial to them. First, over the Manifold Defendants' objection,



the court granted challenges for cause on three venire members who had reservations about awarding damages for mental anguish but ultimately agreed they would follow the law. Second, over the Manifold Defendants' objection, the court granted a challenge for cause regarding an elderly juror who had diabetes. Third, again over the Manifold Defendants' objection, this court granted a directed verdict (JML) for Plaintiffs on the issues of negligent construction and reckless fraud. Fourth, it was error for the jury to decide on the claim of wantonness as there was insufficient evidence for such a finding on the part of Manifold Construction. Fifth, the jury's award of punitive damages is outside of the allowable bounds in that it is more than three times the award of compensatory damages. Sixth, testimony concerning alleged but altogether unsubstantiated drug use by Manifold Construction employees was improperly submitted to the jury. Seventh, the jury should not have been able to consider Jack Manifold's individual liability as he was working in his capacity as a member of Manifold Construction, LLC throughout the course of the project. Finally, the directed verdict on the breach of contract claim was in error because the contract between the parties had been rescinded.

Because of the above-referenced errors that resulted in prejudice, the Manifold Defendants are entitled to a new trial.

1. Three jurors who expressed reservations about mental anguish damages should not have been struck from the jury.

Over the Manifold Defendants' objection, Plaintiffs challenged for cause three potential jury members who initially expressed reservations about awarding mental anguish damages, but then said they would be able to follow the

law regarding that issue. Plaintiffs' challenge for cause was improper and should not have been granted. Alabama law has provided the following concerning the striking of a juror under these circumstances:

Even though a prospective juror may initially admit to a potential for bias, the trial court's denial of a motion to strike that person for cause will not be considered error by an appellate court if, upon further questioning, it is ultimately determined that the person can set aside his or her opinions and try the case fairly and impartially, based on the evidence and the law.

Hall v. State, 820 So.2d 113, 126-127 (Ala. Crim. App. 1999) (quoting *Travis v. State*, 776 So.2d 819, 867 (Ala. Crim. App. 1997)).

The real test in deciding a challenge for cause is determining whether the juror at issue can ignore any preconceived ideas he may have and still render a verdict according to the evidence and law. *Ex parte Burgess*, 827 So.2d 193 (Ala. 2000). This challenge for cause must show an *absolute* bias or favor. *Hutchins v. DCH Regional Medical Center*, 770 So.2d 49, 54 (Ala. 2000); *Wallace v. Alabama Power Co.*, 497 So.2d 450 (Ala. 1986).

The jurors at issue indicated an initial hesitation towards awarding mental anguish damages, but then stated they would be able to follow the law regarding such an award. Clearly there is no absolute bias against mental anguish damages awards shown in this instance, as the jurors themselves indicated their ability to follow the law properly. A juror may be excused when his opinion or bias is so fixed that he is prevented from trying the case fairly and impartially. *Stewart v. State*, 601 So.2d 491 (Ala. Crim. App. 1992). As no such opinion or bias was shown, given the jurors' willingness to follow the law as to mental anguish

damages, the challenge was without basis. Therefore the granting of the challenge and the striking of those jurors, was in error. Plaintiffs succeeded in eliminating any jurors who had an initial opinion concerning mental anguish damages adverse to their interests, even though those jurors agreed they would follow the law on the issue. Once a juror indicates he can put aside his personal opinions and follow the law, the juror cannot properly be struck. As such, the Manifold Defendants were prejudiced and a new trial is due.

2. The challenge for cause of a diabetic juror was improper.

The court granted the Plaintiffs' challenge for cause of a potential juror who had diabetes. The striking of this juror was improper and prejudiced the Manifold Defendants, as there was no basis for this strike. Under Alabama law, it is proper to strike a juror who does not want to serve due to poor health. *See Hall v. State*, 820 So.2d 113 (Ala. Crim. App. 1999). In *Hall*, a potential juror had been sick for some time with hypertension and heart disease, and thus the court determined this was a valid reason for striking the juror. In the present case, however, there was no discussion of the juror's overall health and whether he would be able to serve in his fullest capacity. Though the juror may from time to time need food or water that other jurors may not need with similar frequency, this alone does not constitute poor health that would prevent a juror from serving. When the juror himself did not request to be released from jury service due to his diabetic condition, the court should not infer that such condition will be an impediment to service or the trial proceedings.

There was simply not enough information provided concerning the juror's diabetic condition which would lead to a proper strike of that juror. As such, the Manifold Defendants were prejudiced by the court's decision to strike the juror.

3. The directed verdict on the issues of negligent construction and reckless fraud was improper.

Over the Manifold Defendants' objection, this court granted a directed verdict in favor of the Plaintiffs on the issues of negligent construction and reckless fraud. Reckless fraud should never have been presented to the jury. The Manifold Defendants now assert the trial court's decision was in error.

In order for a directed verdict to be properly entered, there must be "a complete absence of proof on a material issue" or "no disputed questions of fact for the jury to determine." *Bergob v. Scrushy*, 855 So.2d 523, 530 (Ala. Civ. App. 2006) (quoting *Woodruff v. Johnson*, 560 So.2d 1040 (Ala. 1990)). Essentially, "a directed verdict is proper only if the evidence and the inferences which can be drawn from that evidence must lead reasonable persons only to one conclusion." *Pegram v. Hebding*, 667 So.2d 696, 701 (Ala. 1995). The evidence presented showed the jury could have reached a different conclusion, however they were not given such an opportunity due to the directed verdict. As a result of the directed verdict, the Manifold Defendants were prejudiced.

a. Negligent Construction

Plaintiffs' claim of negligent construction was presented in count nine in the First Amended Complaint. Through this claim, Plaintiffs allege the Manifold Defendants negligently performed installations and/or construction on the project. Such installations and/or construction included work on the sewer

system, certain manholes, the drain rise gate and/or closing valve on the dam, and the coring of the dam. There is simply no evidence presented to demonstrate that a directed verdict on this issue was proper.

At the time the Manifold Defendants left the project, Plaintiffs determined it was necessary to finish grading the roadways, install additional utility lines, repair the water system, and repair the sewer. Plaintiffs claim to have discovered Manifold's alleged poor workmanship upon beginning repair work. Despite these repair efforts, Plaintiffs encountered problems with the dam after it had been repaired by a second company, Kendrick Construction. Because of the work performed by Kendrick, it cannot be known which damages or mistakes that had to be remedied by the Plaintiffs were made by Manifold or Kendrick. Alabama law has provided:

However negligent a person may have been in some particular, he is liable only to those who may have been injured by reason of such negligence, as the proximate cause. Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible.

Baugh v. Bradford, 529 So.2d 996, 999 (Ala. 1998) (quoting *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1194 (Ala. 1985) (internal citations omitted)).

There are too many unresolved questions of fact concerning the work performed on the project to allow the issue of negligent construction to be kept from the jury. It is for the jury to determine, based on the facts and evidence presented, whether it was clearly the acts of the Manifold Defendants which caused problems with the project. The evidence cannot definitively point to the

Manifold Defendants for the damage done, and thus the directed verdict which took the decision out of the jury's hands prejudiced these Defendants.

b. Reckless Fraud

Plaintiffs contend the Manifold Defendants, through Jack Manifold, misrepresented certain facts concerning the Defendants' performance on the job, responsibilities to subcontractors and other workers or vendors, and similar matters. Plaintiffs assert they relied on the representations made and were consequently damaged by the Defendants' failure to be honest about their ability to complete the work. By entering a directed verdict, this court made the determination that there was nothing on the issue of fraud to be presented to the jury, a determination which was in error given the evidence presented.

The trial court erred by directing a verdict on reckless fraud when it should have dismissed such count. There was no evidence to substantiate a count of reckless fraud. Rather, the only viable count would have been one of innocent fraud, as it was clear through the evidence that there was no intent to deceive shown by the Defendants.

The Manifold Defendants were not given the opportunity to present to the jury their actions surrounding this project. For instance, the fact that Manifold Construction was undergoing financial difficulty was disclosed to the Plaintiffs from the very beginning of the project. As such, Plaintiffs would have had knowledge of potential problems with the Defendants' abilities on the project due to the financial hardship. By directing a verdict, the trial court prevented the jury from hearing this mitigating circumstance. Further, there is no evidence that at the time the contract was made Jack Manifold did not intend to fulfill his

responsibilities under the contract. Rather, Manifold Construction was simply having financial struggles which could impact the work, but Jack Manifold still intended for Manifold Construction to complete the work it agreed to do. Similarly, there is no evidence that Jack Manifold operated with any intent to deceive the Plaintiffs. The Plaintiffs' contention that the Manifold Defendants were dishonest in communications concerning the subject property is unsubstantiated.

All of the facts demonstrate that any misrepresentation alleged was innocent in nature, not reckless. Under Alabama Code § 6-5-101, a distinction is made between a reckless and an innocent misrepresentation based upon the intent of the party making the alleged misrepresentation. Alabama law provides that an innocent misrepresentation does not require an element of recklessness or willfulness. *Young v. Serra Volkswagen, Inc.*, 579 So.2d 1137 (Ala. 1999). As there was simply no evidence submitted to show an intent to deceive by the Manifold Defendants, the reckless misrepresentation claim was due to be dismissed. Instead, at most, an innocent misrepresentation claim was due to be presented to the jury.

The issue of reliance also comes into play when considering a claim of fraud. In this instance, it cannot be said that Plaintiffs reliance on the Manifold Defendants' representations was reasonable given their knowledge of the Defendants' financial problems. As stated, from the beginning the Plaintiffs were made aware of Manifold Construction's financial difficulties. Plaintiffs also had a history with Manifold Construction through work performed on the first phase of Sanders Creek as well as working as a subcontractor on projects of Plaintiff

Sheldon Whittelsey's previous company. Given Manifold's admission that it had financial problems going into the project, Plaintiffs' reliance on Manifold's representations concerning the project was unreasonable and misplaced. Plaintiffs cannot now contend that these Defendants fraudulently misrepresented their abilities on this project when Defendants were open and honest about the financial situation from the beginning.

The main point presented here is that there is plenty of evidence and disputed facts that were not allowed to be presented to the jury on the issues of negligent construction and reckless fraud. A directed verdict should not be granted "if there is any conflict in the evidence for the jury to resolve." *Independent Life & Acc. Ins. Co. v. Parker*, 470 So.2d 1289, 1291 (Ala. 1985). These conflicts go to the heart of the Manifold Defendants' intentions and actions concerning this project, the Plaintiffs' understanding of the Defendants' representations, and the overall interaction between the parties on the project. The evidence is not so clear cut as to direct a verdict for the Plaintiffs on the issues of negligent construction and reckless fraud, and to do so was in error. By presenting the facts to the jury, a different conclusion could have been drawn, and it was prejudicial to the Manifold Defendants not to be afforded the possibility of a different conclusion. Further, a directed verdict on these issues tainted the jury to believe that because the Manifold Defendants were liable on these counts, they were necessarily liable on all other counts. Due to the prejudice resulting from the directed verdict, it is clear the directed verdict was in error and a new trial on these issues is warranted.

4. **The wantonness count should not have been submitted to the jury; such issue should have been decided on summary judgment.**

The Alabama Code defines wantonness as "conduct which is carried on with a reckless or conscious disregard of the safety of others." Alabama Code (1975) § 6-11-20(b)(3). There must be a showing of consciousness that injury is likely to result. The trial court erred in submitting the count of wantonness to the jury as there was no showing of any knowledge or consciousness on the part of the Manifold Defendants that injury would occur. This issue should have been decided in favor of the Defendants upon their motion for summary judgment.

The testimony presented at trial showed Jack Manifold, as the owner of Manifold Construction, never intended to cause any harm to the Plaintiffs. He was unaware of the severity of his financial situation and business problems. Jack Manifold became overwhelmed with the amount of work Manifold Construction was doing and was unable to get out from underneath the problems. Despite these problems, there is a complete absence of evidence that Jack Manifold had the requisite conscious culpability to warrant a finding of wantonness. Further, there is no evidence to indicate that the work performed by Manifold Construction on the Sanders Creek project was done in a wanton manner. There was no evidence was presented to show Manifold Construction was aware of any poor workmanship, which negates any conscious culpability on its part regarding the work done.

The mindset which Manifold Construction and Jack Manifold had on the Sanders Creek project was not one that rose to the level of wantonness. Rather, these Defendants tried to do the job they were hired to do, but were unable to

complete that job due to financial difficulties with the company. At no time did these Defendants set out to harm the project. Without any evidence as to these Defendants having knowledge that injury and damage would occur to this project, summary judgment on this issue was proper. The Court's denial of the Defendants' motion for summary judgment on this issue was in error, and therefore the wantonness count was improperly submitted to the jury.

5. The punitive damages awarded are improper, excessive and due to be reduced, and therefore a hearing for review of this award is requested.

Punitive damages awards are proper only when there is a showing of intentional conduct. The applicable code section provides:

Punitive damages may not be awarded in a civil action...other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.

Alabama Code (1975) § 6-11-20(a).

As discussed, there is a lack of clear and convincing evidence of wantonness on the part of the Manifold Defendants. Plaintiffs have not shown any intent to deceive on the part of Jack Manifold or Manifold Construction. To the contrary, these Defendants were upfront and honest about the company's financial condition and ability to move forward with the project once it went out of business. Plaintiffs have also failed to show that any construction errors were made intentionally to cause harm to the Plaintiffs. Any mistakes made were innocent in nature, and the jury should have been instructed as to the innocence, rather than intentional or reckless nature, of any misrepresentations alleged.

Without any evidence of intentional conduct, a punitive damages award is improper. See *Ferguson v. Baptist Health System, Inc.*, 910 So.2d 85 (Ala. 2005); *Shiv-Ram, Inc. v. McCaleb*, 892 So.2d 299 (Ala. 2003).

Even if the court should determine that punitive damages were proper, the amount awarded is excessive. The jury awarded \$275,000 in compensatory damages to the Plaintiffs based upon the wantonness claim asserted against the Manifold Defendants. The jury then assessed \$1,500,000 in punitive damages against Manifold Construction, LLC and \$1,000,000 against Jack Manifold individually. These assessments of punitive damages are excessive and must be remitted.

Alabama Code (1975) § 6-11-21 governs the award of punitive damages. In a case which does not involve physical injury, such as the case herein, punitive damages must be, at most, three times compensatory damages or \$500,000, whichever is greater. The code section further provides in subparts (b) and (c) that when the defendant is a small business, meaning a business having a net worth of less than \$2,000,000 at the time of the occurrence made the basis of the suit, punitive damages cannot exceed \$50,000 or ten percent of the business's net worth, whichever is greater. See also *Prudential Ballard Realty Co. v. Weatherly*, 792 So.2d 1045 (Ala. 2000). As Manifold Construction, LLC was a small business at the time of the occurrence, and is now out of business, the punitive damages award against it cannot exceed \$50,000. Similarly, because Jack Manifold was operating in his capacity as owner and member of Manifold Construction, LLC, any damages assessed against him should also come under

the \$50,000 cap. The punitive damages award clearly violates the applicable portion of the Alabama Code and is due to be remitted.

a. Request for hearing to review the punitive damages award.

Due to the excessiveness of the punitive damages award, the Manifold Defendants request a hearing pursuant to Alabama Code (1975) § 6-11-23(b), which provides as follows:

In all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any part, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages.

The Manifold Defendants further point out that Alabama law, through *Hammond v. City of Gadsden*, 493 So.2d 1374, 1378 (Ala. 1986), provides that a court may reduce a jury's award of punitive damages if it can be shown by these Defendants that (1) the amount of the award is excessive and (2) that because of the excessiveness of the award, these Defendants are being deprived of property contrary to constitutional protections. Clearly there is no substantial evidence to support the punitive damages awarded, nor do the punitive damages comport with statutory limitations. As such, the punitive damages are excessive and grossly disproportional to the Manifold Defendants' alleged offenses.

6. Testimony regarding alleged drug use was prejudicial to the Manifold Defendants as there was no credible evidence of defects to the project resulting from the alleged drug use.

The Manifold Defendants have been prejudiced by the testimony presented by Plaintiffs' witness Jesse Cason concerning alleged drug use by Manifold employees on the Sanders Creek project. The Manifold Defendants'

objection to this testimony was improperly overruled. Plaintiffs have not been able to point to a specific defect in the Manifold Defendants' work which resulted from this alleged drug use, and therefore the testimony's prejudicial effect far outweighed any probative value it may have had. Therefore, under Alabama Rule of Evidence 403, this evidence was due to be excluded.

Plaintiffs have failed to relate any specific defect in the Sanders Creek project to the alleged drug use. Evidence related to non-pled claims is irrelevant and will not assist the trier of fact in determining the claims at issue. Instead, the admission of the evidence, albeit unsubstantiated, has the resulting effect of characterizing the Defendants in a very negative light. The evidence was clearly used in an attempt to prove the alleged negligence and wantonness of the Manifold Defendants, which was improper. The discussion of the non-pled claims related to the alleged drug use in the course of trying the other claims was unfairly prejudicial to these Defendants. As the alleged drug use was not probative as to the work performed on the project, as no defects were recognized as resulting from the alleged drug use, it served only to prejudice the Defendants as to all other claims presented. The evidence related to the alleged drug use improperly led the factfinder to determine the Manifolds' negligence and wantonness.

7. Jack Manifold should not have been held liable as an individual, as he was working in his capacity as a member of Manifold Construction, LLC.

Throughout the course of the Sanders Creek project, Jack Manifold worked as a member of Manifold Construction, LLC. While working in that

capacity, it was improper for the jury to award damages to the Plaintiffs against Jack Manifold individually.

Jack Manifold worked on the Sanders Creek project entirely in his capacity as owner and operator of Manifold Construction, LLC. He signed the contract with the Plaintiffs as owner of Manifold Construction, LLC, and not as an individual. It has been held that when a contract is signed on behalf of an LLC in the capacity of an owner or member, that owner or member does not become a signatory to the contract in an individual capacity. *See Clement Contracting Group, Inc. v. Coating Systems, LLC*, 882 So.2d 971, 975 (Ala. 2003). The Alabama Limited Liability Company Act, codified in the Alabama Code, further directs that a member or manager of an LLC is not a property party to proceedings against the LLC. Alabama Code (1975) § 10-12-18. A member of an LLC will not be found liable except for his own acts or conduct outside of his representation of the LLC itself. Alabama Code (1975) § 10-12-90.

These Plaintiffs have not presented any evidence to show Jack Manifold acted at any time outside of his capacity as the owner of Manifold Construction, LLC. Any representations made or acts performed were all on behalf of Manifold Construction, LLC and its work on the Sanders Creek project. Without a showing that any of the alleged acts were performed by Jack Manifold on an individual basis and not on behalf of Manifold Construction, LLC, Jack Manifold was improperly added as a party to the suit. Subsequently, any finding of liability on an individual basis was improper and in error.

8. The directed verdict on the breach of contract claim was in error due to the rescission of the contract.

The trial court erred in granting a directed verdict to the Plaintiffs on the breach of contract claim. This claim was without merit because the Plaintiffs assumed the contract upon the Defendants' inability to perform fully under the contract. This contract was effectively rescinded by the parties, therefore releasing the Defendants from any liability under it.

After the Defendants realized Manifold Construction would have to go out of business, the parties met to determine how the Sanders Creek project would need to be handled going forward. The Plaintiffs then took over as the general contractor on the project and paid the Manifold Construction employees for work already completed. Plaintiffs were making strides to take over the work which remained unfinished under the contract with the Defendants.

There was a clear decision between the parties that the Plaintiffs would take over what the Defendants could not complete. The contract thus became a nullity. The rescission of the contract erases the validity of the Plaintiffs' breach of contract claim, and therefore the directed verdict on that issue was in error.

Conclusion

WHEREFORE, PREMISES CONSIDERED, Manifold Construction, LLC and Jack Manifold request this court to grant its motion for a new trial due to the prejudices entered against these Defendants through the course of trial.

Respectfully submitted, this the 1st day of December, 2006.

/s/ Bradley J. Smith
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CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of December, 2006 served a copy of the above notice via electronic mail and/or U.S. to the following attorneys of record:

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